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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/656,689	09/08/2003	Thomas J. Coleman		8579

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03/02/2006

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EXAMINER

BRUENJES, CHRISTOPHER P

ART UNIT	PAPER NUMBER
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1772

DATE MAILED: 03/02/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/656,689

Applicant(s)

COLEMAN ET AL.

Examiner

Christopher P. Bruenjes

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 January 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,3 and 5-8 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,3 and 5-8 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____

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DETAILED ACTION

WITHDRAWN REJECTIONS

1. The 35 U.S.C. 102 rejections of claims 5 and 7 as anticipated by Roth of record in the Office Action mailed August 23, 2005, Pages 2-3 Paragraph 1, have been withdrawn due to Applicant's amendments in the Paper filed January 20, 2006.

2. The 35 U.S.C. 102 rejections of claims 5 and 7 as anticipated by Im of record in the Office Action mailed August 23, 2005, Page 3 Paragraph 2, have been withdrawn due to Applicant's amendments in the Paper filed January 20, 2006.

Claim Rejections - 35 USC § 112

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claim 7 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

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The limitation that the substance is "a delectable powder, a candy product, a solution, a delectable food product, or any other product which can be filled into and dispensed from said tube" renders the claim vague and indefinite. Claim 7 is dependent on claim 5, which requires that the substance is a fluid. Therefore, it is not certain if the substance of claim 7 is also a fluid especially with regard to a delectable powder, because a powder is not a fluid.

Claim Rejections - 35 USC § 102

5. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

6. Claims 1, 3, 6, and 8 are rejected under 35 U.S.C. 102(b) as being anticipated by Roth (USPN 4,078,330). Note that claims 1, 3, 6, and 8 were rejected previously by Roth, but for clarification in light of the new amendments the rejection is rewritten below.

Regarding claims 1 and 3, Roth anticipates an elongated bendable tube (reference number 10, Figure 1) of any desirable length, which is formed of a material which can be bent or twisted into a desired shape, in which the tube retains its bent or twisted shape to provide an enjoyable tube (see abstract and

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Figure 1). The bendable tube is formed as a piece of jewelry such as bracelet around an arm or leg of a child or adult (col.1, 1.20-25). The tube includes a removable stopper (reference number 14, Figure 1) on opposite ends of the tube. Note the broadest reasonable interpretation of "removable stopper" is a component of the tube that is removable from and closes, shuts or plugs an opening of the tube. In this case, the unit of Roth closes or plugs the opening of the tube so that the ball remains within the tube, and the unit has external threads so that the unit is threaded into the opening of the tube (Figure 2 and col.2, 1.1-8), thus rendering the unit a removable stopper. Regarding claim 6, the tube includes a ball, which is a substance therein for use upon being dispensed from said tube, because the ball can be used as projectile like any other ball (col.2, 1.19-21). Regarding claim 8, the substance is a product, which can be filled into and dispensed from said tube, since the stoppers on either end can be threaded in and out of the tube, which would allow the ball to be dispensed from the tube.

7. Claims 1, 3, 6, and 8 are rejected under 35 U.S.C. 102(b) as being anticipated by Im et al (USPN 4,965,135). Note that claims 1, 3, 6, and 8 were rejected previously by Im et al, but

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for clarification in light of the new amendments the rejection is rewritten below.

Regarding claims 1 and 3, Im et al anticipate a bendable tube of any desirable length, which is formed of a material which can be bent or twisted into a desired shape, in which the tube retains its bent or twisted shape to provide an enjoyable tube (col.2, 1.8-13 and 22-27). The bendable tube is formed as a tube for a use, which meets the limitation "or any other use". The tube includes a removable stopper on opposite ends of the tube, represented by the twisted end that stops the food item from escaping from the tube (col.2, 1.23-27). Note the broadest reasonable interpretation of "removable stopper" is a component of the tube that is removable from and closes, shuts or plugs an opening of the tube. In this case, the twisted ends of Im et al closes or plugs the opening of the tube so that the ball remains within the tube, and the twisted ends can be untwisted, which renders them removable (col.2, 1.23-27), thus rendering the unit a removable stopper. Regarding claim 6, the tube includes a substance therein for use upon being dispensed from said tube through its end, (col.2, 1.25-27). Regarding claim 8, the substance is a food item or a candy product (col.2, 1.25-27).

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8. Claims 1, 3, and 5-8 are rejected under 35 U.S.C. 102(b) as being anticipated by Lipson et al (USPN 4,687,306).

Regarding claims 1 and 3, Lipson et al anticipate an elongated bendable tube of any desirable length (reference number 10, Figure 1 and col.2, 1.17-20). The tube is formed of a material which can be bent or twisted into a desired shape, but when shaped retains its bent or twisted shape to provide an enjoyable tube (col.2, 1.21-25). The tube is formed as a frame for a pair of eyeglasses (col.2, 1.17 and Figure 1). The tube includes a removable stopper (reference numbers 28 and 30, Figure 1, col.2, 1.26-40) on opposite ends of said tube. Regarding claims 5 and 6, the bendable tube includes a fluid substance therein such as colored liquid (col.2, 1.33-37). The colored water is dispensed from said tube after at least one of said stopper is removed from at least one end of said tube and colored liquid is known to have many uses so it would have a use upon being dispensed, for instance being placed within another bendable tube. Regarding claims 7 and 8, colored liquid is a solution.

ANSWERS TO APPLICANT'S ARGUMENTS

9. Applicant's arguments regarding the 35 U.S.C. 102 rejections of claims 1, 3, 6, and 8 as anticipated by Roth have been fully considered but they are not found persuasive.

In response to Applicant's argument that the open contacts of Roth are not stoppers on each end of the tube, the units (reference number 14, Figure 1) is a housing that holds the contacts and the unit fills or plugs the end of the tube as shown in Figure 2). The broadest reasonable interpretation of "removable stopper" is a component of the tube that is removable from and closes, shuts or plugs an opening of the tube, which the units of Roth do, therefore, the units of Roth are removable stoppers.

In response to Applicant's argument that the ball of Roth is not a substance for use upon being dispensed from at least one end of said tube, the units maintaining the ball within the tube have threads and therefore can be removed from the tube. When the units are removed from the tube the ball would be dispensable. Articles are defined by structure and the structure presented in claim 6, is that a substance is included in the bendable that has a use outside of the tube and is dispensable from the tube. Whether the substance is dispensed or used outside of the tube is not germane to the patentability

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of the article because those are functional limitations and not structural limitations. Functional limitations are only given weight insofar as the structure the function requires. In this case, the ball and the tube have the structure required to perform the function claimed, thus the ball and tube of Roth read on claim 6.

10. Applicant's arguments regarding the 35 U.S.C. 102 rejections of claims 1, 3, 6, and 8 as anticipated by Im et al have been fully considered but they are not found persuasive.

In response to Applicant's argument that Im does not teach that the tube can be bent into different shapes, Im teaches that the film of Im that is later wrapped into the shape of film has twistability, which means the film has the ability to be twisted without fracturing or shearing and hold that twist once released (01.2, 1.8-13). Therefore, Im teaches a tube when the film is wrapped around product that can be bent or twisted into a desired shape and retains its bent or twisted shape to provide an enjoyable toy. Note claim 1 does not require that the tube be in a bent or twisted shape only that it has the ability to bend or twist and then retain that bend or twist. Im teaches that the film formed into a tube has that ability.

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In response to Applicant's argument that Im fails to teach stoppers at the ends of the tube, Applicant's claims merely require removable stoppers, which do not require that those removable stoppers not be connected to the tube when removed. The candy is placed within the wrapper and then ends are twisted so as to stop the candy from falling out the end of the tube shaped film. By untwisting the ends of the wrapper the stopper is removed because it is no longer stopping the candy from falling out the end of the tube shaped film. The tube is the wrapper wrapped around the candy and the twisted ends are the removable stoppers until they are untwisted, wherein the ends would no longer be stoppers and thus are removed.

Conclusion

11. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Iovenko (USPN 3,226,285); JP'920 (JP 11-127920 A).

12. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Christopher P. Bruenjes whose telephone number is 571-272-1489. The examiner can normally be reached on Monday thru Friday from 8:00am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon can be reached on 571-272-1498. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Christopher P Bruenjes
Examiner
Art Unit 1772
CPB
CPB
February 23, 2006


HAROLD PYON
SUPERVISORY PATENT EXAMINER
1772

2/26/06